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GENDER AND SEXUAL DIVERSITY: A QUESTION OF HUMANITY?

DIANNE OTTO*

Twenty-one years ago I was sitting in the African NGO Caucus at the 4th World Conference on Women in Beijing, waiting my turn to speak. The NGO representatives at the conference had organised themselves into caucuses to pursue issues of common concern. One of the caucuses I joined was the Lesbian Caucus. Our goal was to fight to retain the four references to 'sexual orientation' as a prohibited ground of discrimination in the draft Program for Action, that states were to adopt by the end of the conference. The official debate about lesbians had quickly plunged to fearmongering depths, with the spectre of lesbianism conflated with pedophilia, western decadence, family breakdown and even bestiality.[1] I had volunteered to speak to the African Caucus, on behalf of the Lesbian Caucus, to urge them to lobby their state representatives to support retention of the references to sexual orientation.

As I waited my turn to speak, I listened to others speaking about the gendered effects of entrenched poverty, interminable armed conflicts, structural adjustment programmes, spiralling crime and millions of refugees and displaced people. As I listened, I felt a sense of shame rising from deep within me — a familiar shame of self-loathing and embarrassment related to my sexuality. Did I really think that the persecution of lesbians deserved to be treated as seriously as the problems these women were talking about? Clearly the chairwoman was wondering the same thing as, when my two-minute slot at the end of the agenda finally arrived, she introduced me by reminding everyone that this was a 'democratic' forum and that I should be allowed to speak. My efforts to convey the importance of retaining those few references to 'sexual orientation' were met with what felt like stony silence, and I went away feeling I had failed to convey the pain and inhumanity of women's lack of sexual autonomy and of homophobia. Yet afterwards, in the labyrinthine corridors of the conference venue, I was stopped on three separate occasions by African women, who each thanked me for what I had said and expressed their support for the Lesbian Caucus. That shame had also prevented them from expressing their views more publicly was clear. This experience of being an object of disgust and of needing to hide our sexuality was something that we shared.

Talking about the subject of gender and sexual diversity is not easy for many people. It can invoke not only shame, but also stigma, rejection, self-hatred and homophobic violence, and lead to imprisonment and even state-sanctioned death.

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1 See generally Dianne Otto, 'Lesbians? Not in My Country: Sexual Orientation at the Beijing World Conference on Women' (1995) 20 *Alternative Law Journal* 288.

As recently as 2013, Russia strengthened its legislation banning the expression of positive opinions, and the provision of positive information, about homosexuality — what it calls the 'propaganda of homosexuality'. Even before the law was toughened, LGBTIQ activist Irina Fedotova had been arrested and found guilty of an offence for displaying posters near a secondary school stating simply '[h]omosexuality is normal' and 'I am proud of my homosexuality', which the United Nations Human Rights Committee found to be a violation of her right to freedom of expression under the *International Covenant on Civil and Political Rights* ('*ICCPR*').[2]

It is important to acknowledge the bravery of the many people who have taken, and continue to take, extraordinary risks to advocate for full recognition of the humanity of LGBTIQ people. Without them, I think I can safely say, all of the positive developments that I make reference to in this lecture, would not have taken place.

It is also important to acknowledge that we all have a 'sexual orientation' — that heterosexuality is as much a sexual orientation as homosexuality, and that these two categories do not exhaust the possible forms that sexual orientation can take. There are, for example, those who identify as bisexuals, pansexuals,[3] omnisexuals[4] and metrosexuals[5] and I would also include asexuality and celibacy as sexual orientations, though some of my more pedantic colleagues would disagree. The point is not so much the categories and specific terms people might use to describe themselves because, taken more broadly, they will always have exclusionary effects and also because categorisation suggests a certain sexual determinism and lack of fluidity in sexual desires, practices and identities. As Carole Vance has observed, '[t]he hallmark of sexuality is its complexity: its multiple meanings, sensations and connections'[6] and, as Jeffrey Weeks following Michel Foucault has argued, sexuality results from specific historical processes which define sexuality at any particular historical moment.[7]

With all this in mind, let us think globally for a moment. The law is a powerful means of denying a person their full humanity and thereby reinforcing and legitimating stigma, shame and homophobic violence and punishment. Consider the mapping of laws relating to sexual orientation as they stood at June

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[2] Human Rights Committee, *Views: Communication No 1932/2010*, 106th sess, UN Doc CCPR/C/106/D/1932/2010 (19 November 2012) annex ('*Fedotova v Russian Federation*'). See *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

[3] Not limited in sexual choice with regard to biological sex, gender, or gender identity. See, eg, 'Pansexual', *Macquarie Dictionary* (online) (Macmillan Publishers, 2015) <https://perma.cc/N47A-XLA2>.

[4] 'Omnisexual' refers to those '[i]nvolving, related to, or characterised by a diverse sexual propensity': 'Omnisexual', *English Oxford Living Dictionaries* (online) (Oxford University Press, 2016) <https://perma.cc/GEW7-FMJF >.

[5] 'Metrosexual' is commonly defined as a man, living in an urban, post-industrial, capitalist culture, who is especially meticulous about his grooming and appearance, typically spending a significant amount of time and money on shopping as part of this. See generally 'Metrosexual', *Dictionary.com* (online) <https://perma.cc/4EAM-9ZJA>.

[6] Carole S Vance, 'Pleasure and Danger: Toward a Politics of Sexuality' in Carole S Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (Routledge, 1984) 1, 5.

[7] See Jeffrey Weeks, *Sexuality and Its Discontents: Meanings, Myths and Modern Sexualities* (Routledge, first published 1985, 2002 ed).

2016, collated by the US-based International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA').[8] This map divides these laws into three broad categories: criminalisation (various shades of red), protection (blue shields) and recognition (green). About 40 per cent of states criminalise consensual same-sex sexual activity (despite being victimless), ranking men who have sex with men (and sometimes lesbians too) among the most serious offenders under their respective criminal codes. These states form an arc of red colour around the globe, which includes many Caribbean countries, at least half of Africa, the Middle East, South Asia and many Pacific Island nations. Of these, 13 states (or parts of states) impose the death penalty, while 73 states and five entities impose terms of imprisonment, many of which range from 14 years to life. It is important to remember that 14 US states would have been included in this arc as recently as 2003, when the Supreme Court found that the criminalisation of sodomy was a violation of the *United States Constitution*, which led finally to its decriminalisation across the US.[9] It should also be noted that, while there are no criminal sanctions in place in the Russian Federation, banning speech that is in any way positive about homosexuality does much the same demonising work as anti-sodomy laws.

The 'protection' category comprises states that have adopted laws prohibiting discrimination on the ground of sexual orientation. As of June 2016, this included 76 countries and 85 entities. In this category are North America and nearly all South American states, Western and some of Eastern Europe, Scandinavia, Israel, Southern Africa, Australasia, some Indian Ocean and Pacific Island states, Nepal, Thailand, Indonesia, East Timor, the Philippines and Taiwan. The scope of these protections varies widely, as does the strength of enforcement procedures and mechanisms.

The third category of 'recognition' includes those states that give some form of legal recognition to same-sex unions, and is a subset of the protection category. Included are 47 states and 65 entities. Of these, 22 states recognise same-sex marriage (dark green), while the rest recognise some form of civil union or other marriage substitute (lighter greens). There is also a 'silent' fourth category of states with no specific legislation, which includes China, and many states in Central Asia, Eastern Europe and Africa.

Of course we need to be very cautious about how we read such a map; in the first instance, because it represents what we might call 'law on the books' rather than 'law in practice'. Simply mapping laws tells us nothing about the extent to which those laws are enforced, and nothing about whether they are contested, whether they reflect social attitudes to homosexuality, or how attitudes may vary depending on location, class, race, urban and rural settings and so on.

A second cautionary note about the map is that it suggests that the green-coloured states, where there is some form of same-sex relationship recognition, are free of homophobic violence and discrimination. Recall the recent tragic shooting at a gay nightclub in Orlando, Florida, that killed 49 people and wounded 53 others, and the Christian fundamentalist voices in the US

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[8] International Lesbian, Gay, Bisexual, Trans and Intersex Association ('ILGA'), *Sexual Orientation Laws in the World — Overview* (June 2016) <https://perma.cc/KKR2-38BV>.

[9] *Lawrence v Texas*, 539 US 558, 578 (Kennedy J) (2003).

that suggested these deaths were something to be celebrated.[10] Recall also, the recent discussion of the Safe Schools Program in Australia, which aims to create safe and inclusive secondary school environments for same-sex attracted, intersex and gender-diverse students, staff and families. Amongst the vitriol that we heard from hostile politicians was that the program introduces children to unhealthy ideas, promotes pornography, group sex and gay bars, and encourages pedophilia (sounding eerily similar to the discussion in Beijing).[11]

Thirdly, this mapping suggests that the recognition of same-sex marriage is the ultimate 'liberation' — the definitive marker of the full humanity of gay and lesbian people. But where does this leave those who choose not to get married, who prefer occasional sex, or group sex, or sex with genders not male or female? Does the legalisation of same-sex marriage bring the humanity of these people even further into question? Do they become even more demonised? And what does this say about us all? Is state-sanctioned marriage the ultimate expression of everyone's humanity? (I will return to the issue of marriage equality a little later).

Finally, this mapping exercise does not tell us anything about how other sexual practices are regulated. For example, heterosexual adultery is criminalised in many parts of the world, including in about 20 US states.[12] It follows that it is now possible for same-sex married people to be charged under these adultery laws as well. In some places (not the US), the crime of adultery is considered so serious that it can attract the death penalty (notably for women, who are usually the targets of adultery laws).[13]

Despite these cautions, the ILGA map clearly shows that the lives of people who are intimate with someone of the same sex are, in many parts of the world, so undervalued that they are subject to severe criminal punishments. Even where same-sex relationships are recognised by law, they are often recognised as inferior to heterosexual partnerships, and homophobic violence continues to be condoned by some in the community. In the political organs of the UN, the question as to whether restrictions on sexual freedom, and the violence and discrimination suffered by those who do not conform to dominant sexual norms, are human rights issues is hotly contested. But how could this be?

If we go back to 1948, the adoption of the *Universal Declaration of Human Rights* ('*UDHR*') by the UN General Assembly declared a new global era in which states would strive to ensure that *everyone* enjoyed human rights and fundamental freedoms.[14] Its Preamble began by stating that the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the

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[10] Lindsey Bever, 'Pastor Refuses to Mourn Orlando Victims: "The Tragedy Is That More of Them Didn't Die"', *The Washington Post* (online), 15 June 2016 <https://perma.cc/2KQX-4R29>.

[11] See, eg, 'Safe Schools Program Like Child Grooming: Christensen', *SBS News* (online), 25 February 2016 <https://perma.cc/Q2D4-MEZU>.

[12] Ethan Bronner, 'Adultery, an Ancient Crime That Remains on Many Books', *The New York Times* (online), 14 November 2012 <https://perma.cc/WT42-J2N5>.

[13] For example, prosecutions for adultery are common in Saudi Arabia, Pakistan and Somalia, and punishment can include fines, imprisonment, flogging and in extreme cases, the death penalty: see Adam Isaacs, 'Where is Adultery Illegal? Vastly Different Punishments Handed Down Around the World', *AOL*, 10 September 2015 <https://perma.cc/9MEG-WW73>.

[14] *Universal Declaration of Human Rights,* GA Res 217A (III), UNGAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*UDHR*').

human family is the foundation of freedom, justice and peace in the world'.[15] This was a hopeful moment, when the member states of the UN affirmed the full humanity of every human being, recognising everyone's intrinsic value and dignity.

Yet there are many gaps in the coverage of the *UDHR*, which reflect the conceptions of humanity that prevailed at that time. Indigenous peoples, for example, were then considered to be 'disappearing' through assimilation. Even so, I find it bewildering that male homosexuals were not protected explicitly in the *UDHR*, because of their internment in Nazi concentration camps during World War II, where many thousands of them died.[16] Indeed this omission, and the support of the Allies for the continued criminalisation of homosexuality in post-war Germany,[17] confounds every sense of inherent human dignity, at least from the perspective of today. Instead, the *UDHR*, and the other international human rights instruments that followed in its wake, confined sexuality to heterosexual marriage and, even then, only by way of obscure references to the right to 'found a family'.[18] There was no reference to sexual freedom and nor was there any reference to reproductive rights.

In the 1950s, when two German homosexuals complained to the newly established European Court of Human Rights that the criminalisation of homosexuality in Germany was contrary to the *European Convention on Human Rights* ('*ECHR*'), the court dismissed their claim on the basis that their complaint was 'manifestly ill-founded', and that it fell within the 'health and morals' exception allowed in protecting the right to privacy.[19] This decision was not reversed until 1981, in a case brought by Jeff Dudgeon, a gay activist from Belfast, which found that the laws that criminalised male homosexual acts in England, Wales and Northern Ireland violated the right to privacy protected by the *ECHR*.[20]

It took the international human rights bodies much longer. In 1982, the Human Rights Committee, which monitors the *ICCPR*, in its first decision dealing with lesbians and gay men, found that the Finnish Government was justified in limiting the freedom of expression of positive views about homosexuality on radio and television programs, in order to protect public morals.[21] (This ban was similar to that in place in Russia today, under which Irina Fedatova was charged). A report on the legal and social problems of sexual

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15 Ibid.

16 See, eg, Geoffrey J Giles, 'The Institutionalization of Homosexual Panic in the Third Reich' in Robert Gellately and Nathan Stoltzfus (eds), *Social Outsiders in Nazi Germany* (Princeton University Press, 2001) 233, 243, 249–50.

17 Nicole LaViolette and Sandra Whitworth, 'No Safe Haven: Sexuality as a Universal Human Right and Gay and Lesbian Activism in International Politics' (1994) 23 *Millennium* 563, 567.

18 See, eg, *UDHR* art 16(1); *ICCPR* art 23(2).

19 LaViolette and Whitworth, above n 17, citing Philip Girard, 'The Protection of the Rights of Homosexuals Under the International Law of Human Rights: European Perspectives' [1986] *Canadian Human Rights Yearbook* 3, 7.

20 *Dudgeon v United Kingdom* (1981) 45 Eur Court HR (ser A).

21 Human Rights Committee, *Report of the Human Rights Committee,* 37th sess, Supp No 40, UN Doc A/37/40 (22 September 1982) annex XIV ('*Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights concerning Communication No R 14/61*') 161, 165 [10.3]–[11].

minorities, commissioned in 1983 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities,[22] usually a very progressive body, relied heavily on 'stereotypes and misinformation' and referred disparagingly to same-sex relationships.[23] The report failed to challenge the grip of the heteronormative status quo in the field of human rights — even though we were 35 years into the new era of universal human rights and freedoms.

Finally, it was an Australian case, brought by gay Tasmanian Nicholas Toonen, which led the Human Rights Committee to find, in 1994, that anti-sodomy laws were a violation of the right to privacy, as protected by art 17 of the *ICCPR*. By that time, Tasmania was the only Australian state that had not reformed its criminal code.[24] Earlier, the Tasmanian Parliament had decided against repealing its laws. Many of the public submissions made during this law reform effort make sobering reading. They included a raft of homophobic smears and insults including that 'gays are an octopus of infection stretching across the world', 'homosexual teachers betray their students', and my own favourite, 'lesbians report double the number of automobile accidents as compared to normal women'.[25]

Yet, despite the finding of the Human Rights Committee, the Tasmanian government still refused to change its laws. It took the adoption of legislation by the federal government,[26] which was designed to override the Tasmanian laws, as well as an indication from the High Court of Australia that the legislation did in fact achieve this,[27] before the state laws were finally repealed in 1997.

Yet law reform, even when it arrives, is not always as positive as it appears. Consider for example, the wording of the Preamble to the Western Australian legislation that decriminalised sodomy in 1989:

> WHEREAS, the Parliament does not believe that sexual acts between consenting adults in private ought to be regulated by the criminal law;
>
> AND WHEREAS, the Parliament disapproves of sexual relations between persons of the same sex;
>
> AND WHEREAS, the Parliament disapproves of the promotion or encouragement of homosexual behaviour;
>
> AND WHEREAS, the Parliament does not by its action in removing any criminal penalty for sexual acts in private between persons of the same sex wish to create a change in community attitude to homosexual behaviour; …[28]

This kind of law reform comes at considerable cost to the gay and lesbian community.[29] While sodomy is no longer criminalised, all the demonising

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22 Jean Ferand-Laurent, *Study on Legal and Social Problems of Sexual Minorities*, UN ESCOR, UN Doc E/CN.4/Sub.2/1988/31 (13 June 1988).

23 Douglas Sanders, 'Getting Lesbian and Gay Issues on the International Human Rights Agenda' (1996) 18 *Human Rights Quarterly* 67, 88.

24 South Australia was the first in 1975; the Australian Capital Territory in 1976; Victoria in 1982; New South Wales and the Northern Territory in 1984; Western Australia in 1989; and Queensland in 1990.

25 Wayne Morgan, 'Queer Law: Identity, Culture, Diversity, Law' (1995) 5 *Australian Gay and Lesbian Law Journal* 1, 7.

26 *Human Rights (Sexual Conduct) Act 1994* (Cth).

27 *Croome v Tasmania* (1997) 191 CLR 119.

28 *Law Reform (Decriminalisation of Sodomy) Act 1989* (WA) Preamble.

mythologies that feed homophobic violence and discrimination are reaffirmed. The Parliament leaves no doubt at all that it is crediting homosexuals with very limited humanity.

And there is still more. Although sodomy was decriminalised in Victoria in 1981, it took another 33 years before the Victorian government expunged historical convictions for gay sex from the records. Until then, as Noel Tovey explained to *The Age*, gay men were 'haunted by their past convictions' which prevented them from applying for some jobs, such as teaching, or taking on volunteering roles.[30] And, this kind of scrutiny has intensified in recent years, as witnessed in the panic about the Safe Schools Programme.

I now want to turn to the issue of gender diversity, which has taken even longer to be given serious attention by legislatures and human rights bodies, even as social media has forged ahead. Facebook, for example, now provides its members with a list of over 50 gender options, in addition to male and female, from which they can choose up to ten to have recorded in their profiles.[31] Assistance is available for those who are uncertain or confused or just plain curious. Another enterprising cyber forum provides an online quiz, offering instant diagnosis of your gender identity after a series of questions have been answered about such matters as what makes you cry and whether you need someone else's constant attention.[32] My own result was that I was 'male' with higher stereotypically female traits than stereotypically male traits; clearly lacking was the vast range of options offered by Facebook.

On a more serious note, no doubt many of you were watching, as I was, as South African runner Caster Semenya, whose gender credentials have been relentlessly policed for several years now, competed in the 800 metres final at the 2016 Rio Olympics. I think that the years of ridicule and humiliation that Caster has been subjected to are a kind of punishment for being supposedly too masculine by Western standards. This humiliation looked likely to continue when she won the race and, instead of erupting into the usual wild cheering, the stadium went silent. In the following awards ceremony, as she waited to receive her gold medal, Caster looked hauntingly apprehensive about the reception that awaited her. Thankfully, this time the crowd cheered in obvious support, and her relief was palpable. Questions have also been raised about the gender credentials of the two other women, Francine Niyonsaba from Burundi and Margaret Wambui from Kenya, who shared the podium with her.[33] How do we explain that it is women of colour whose gender has been brought into question so prominently?

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29 See also Morgan, above n 25.

30 Daniella Miletic, 'Gay Men Haunted by Old Convictions', *The Age* (Melbourne), 7 January 2013, 1.

31 Will Oremus, 'Here Are All the Different Genders You Can Be on Facebook' on *Future Tense: The Citizen's Guide to the Future* (13 February 2014) <https://perma.cc/SXL6-F4AZ>. The gender identity choices are not provided as a full list, but a drop-down menu of options is provided once you type the first letter into an empty text field. Interestingly, there is no option to craft your own gender identity if it is not on the list, nor can you leave the field blank.

32 See UnBoxifyMe, *Wild Quiz: What's Your Gender Identity* <http://unboxifyme.com/wild-quiz-whats-your-gender-identity/>.

33 Amby Burfoot, 'Why the Women's 800 Will Be the Most Controversial Race at the Olympics', *Runner's World*, 11 August 2016 <https://perma.cc/2B23-EXSQ>.

Later, at her press conference, Caster said

> It's all about loving one another. It's not about discriminating against people and how they look, how they speak, how they run. … It's not about sports. When you walk out of your apartment you think about performing. You don't think about how your opponents look. You just want to do better.[34]

Among the fears about the use of the word 'gender' that were raised in Beijing in 1995 was that it would lead to the recognition that there are more than two genders (a good thing to my mind) and threaten the 'normal' heteronormative family unit (a claim that I utterly refute). Some feminists have also resisted admitting the full implications of the feminist insight that gender is a socially negotiated and dynamic construct (rather than biologically determined), fearing the loss of hard-won attention to women's human rights issues and the weakening of feminist movements.[35] As a feminist, I disagree because I think that broadening our understanding of how gender hierarchies operate across different genders, and across other hierarchies such as race and class, to police, naturalise, regulate and discipline our gender identities, will strengthen our capacity to realise the full humanity and equality of women — and other genders — everywhere.[36]

While, as with sexual orientation, we all have a 'gender identity', there are specific issues that arise for those whose gender identity is different from that recorded on their birth certificates and other official documents like passports. Historically, at least in the West, transgendered people have had to comply with strict conditions that are based on biological understandings of gender, including psychological evaluations and risky surgeries that alter their physical gender characteristics and make them infertile, before they have been allowed to legally change the gender ascribed to them at birth. This is slowly changing in Australia, where more weight is being given to how the person is socially recognised when approving a change in legal gender.[37] Yet there remains a blanket ban on married people changing their legal gender, no matter how many surgeries and how much evidence of social recognition they can assemble, because of the federal government's so-far implacable opposition to same-sex marriage.

Norway is among a small group of countries that have recently adopted new gender recognition laws, which allow complete self-determination, regardless of marital status.[38] People can apply to have their legal gender changed by filling out a simple form and waiting for two months after which, if they still wish to proceed, their legal gender is changed. There is no limit to the number of times a person can formally change their gender by this means. So, all sorts of gender

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34 Jeff Passan, 'Caster Semenya Delivers Poignant Message While Savoring Gold Medal', *Yahoo! Sports*, 21 August 2016 <https://perma.cc/N24Q-UCXS>.

35 See, eg, Berta Esperanza Hernández-Truyol, 'Unsex *CEDAW*? No! Super-Sex It' (2011) 20(2) *Columbia Journal of Gender and Law* 195.

36 See also Dianne Otto, 'Queering Gender [Identity] in International Law' (2015) 33 *Nordic Journal of Human Rights* 299.

37 See, eg, *AB v Western Australia; AH v Western Australia* (2011) 244 CLR 390, 405 [35] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

38 Stein Wolff Frydenlund, 'Norway Approves Legal Gender Recognition Based on Self-Determination' (Press Release, Transgender Europe, 6 June 2016) <https://perma.cc/8N8K-Y9NQ>.

permutations are now possible in Norway, including that a legal woman could beget a child and a legal man could be pregnant. The latter reminds me of a feminist slogan, attributed variously to US feminists Florence Kennedy and Gloria Steinem, which was popular during the 1970s abortion campaigns in Australia — 'If men could get pregnant, abortion would be a sacrament'. Well, now we'll see!

Yet still, the Norwegian system only offers the choice of two genders — either male or female. This was also the case in Australia until recently. What led to change here were the efforts of Sydney identity, Norrie May-Well-Be, who applied to the NSW Registrar of Births, Deaths and Marriages in 2012 to alter the sex recorded on their birth certificate to 'sex non-specific'. The NSW Registrar agreed to make the change but later informed Norrie that it was an error and changed the entry to 'sex not stated'. After appeals to the NSW Administrative Decisions Tribunal (only male/female options permitted) and NSW Court of Appeal ('non-specific' permitted) the issue was considered by the High Court of Australia in 2014.[39] In a unanimous judgment, the High Court agreed with Norrie that '[n]ot all human beings can be classified by sex as either male or female'[40] and found that the wording of the Act itself permitted the registration sought, that is, sex 'non-specific'.[41] It is no small irony that this decision was not justified on human rights grounds, but came from a 'plain reading' of the legislation whose drafters had not considered it necessary to specify what could be recorded in answer to the question of a person's sex or gender.

This is what Norrie had to say after the decision was handed down:

> Maybe people will now understand there's more options than the binary, and even if a person is specifically male or female, their friends might not be — and hopefully people might be a little bit more accepting of that.[42]

I find Norrie's hopefulness very moving, as the resistance can feel overwhelming. Despite the new guidelines for federal government agencies, adopted in 2013,[43] which specify that when sex/gender information is collected, individuals must be given the options M (male), F (female) and X (indeterminate/intersex/unspecified), the recent National Census required those who wanted to register their sex as X to make special application. According to one news report, the Australian Bureau of Statistics ('ABS') justified this by saying they wanted to avoid people choosing the X option as a 'joke'.[44] Sadly, I think this reveals much about the lack of seriousness with which the ABS itself regards this issue.

Let us return again to the international. The issues of sexual orientation and gender identity ('SOGI') were eventually brought into the same frame, in a

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39 *Registrar of Births, Deaths and Marriages (NSW) v Norrie* (2014) 250 CLR 490.

40 Ibid 492–3 [1] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

41 Ibid 501 [46] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

42 Paul Bibby and Dan Harrison, 'Neither Man nor Woman: Norrie Wins Gender Appeal', *The Sydney Morning Herald* (online), 2 April 2014 <https://perma.cc/NF29-ZZGH>.

43 Australian Government, *Guidelines on the Recognition of Sex and Gender* (November 2015).

44 Casey Briggs, 'Census 2016: LGBTI People at Risk of Being Undercounted in ABS Survey, Advocates Say', *ABC News* (online), 2 August 2016 <https://perma.cc/H885-ZVGS>.

historic Statement at the UN Human Rights Council in 2006. The Statement called on the Council to discuss human rights violations involving violence based on SOGI, and was supported by 54 states, led by Norway.[45] The initiative was met with hostility from many other states, and the 'discussion' did not occur. In 2008, a similar Joint Statement on Human Rights and SOGI was presented to the UN General Assembly, read by Argentina and supported this time by 66 states, calling specifically for the abolition of criminal penalties.[46] A counter-statement was then read by Syria, on behalf of a group of 57 states, accusing the others of introducing into the UN 'notions' that have no legal foundation in any international human rights instrument, which may legitimise 'many deplorable acts including pedophilia' and 'seriously jeopardize the entire international human rights framework'.[47] Today, the international community of states remains deeply polarised about whether this is a human rights issue at all — rather than one of immorality, criminality and pathology. It seems that little has changed in this regard since the 1995 World Conference on Women.

What has changed is that the issue has assumed larger dimensions, by being put to the service of other agendas, which have nothing to do with the humanity of sexual and gender minorities and, for some, serve to exacerbate their marginalisation and make their lives even more precarious. This cooption works in a number of ways. To begin with, sexual liberalism has become a new marker of 'civilisation' with maps, such as the ILGA mapping of sexual orientation laws, being (mis)used to illustrate the superiority of the West and, by implication, the backwardness of the non-West — and, particularly in the contemporary world, the Muslim non-West, which is routinely cast as misogynist and homophobic.[48] As a result, some LGBTIQ human rights advocates have found themselves drawn into supporting Islamophobic agendas, helping to justify more general demonisation of states and peoples.[49]

The cause of LGBTIQ rights has also been used to justify — or 'pinkwash' — militarism and occupation. Israel's promotion of itself as gay-friendly is a good example. Israel uses its support for the gay community to showcase its credentials as a liberal democracy and distinguish itself from other states in the region. This has been described as 'homonationalism' whereby the 'homosexual', rather than being viewed as a threat to the nation, has been transformed into someone who is integrated into it, which then enables the state to distinguish itself from others by its tolerance of homosexuality.[50] In Israel's

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45 H E Wegger Chr Strømmen (Norway), 'Joint Statement on Human Rights Violations Based on Sexual Orientation and Gender Identity' (1 December 2006) <https://perma.cc/6LR6-S3BK>.

46 *Letter Dated 18 December 2008 from the Permanent Representatives of Argentina, Brazil, Croatia, France, Gabon, Japan, the Netherlands and Norway to the United Nations Addressed to the President of the General Assembly*, UN GAOR, 63rd sess, Agenda Item 64(b), UN Doc A/63/635 (22 December 2008).

47 UN GAOR, 63rd sess, 70th plen mtg, Agenda Item 64(b), UN Doc A/63/PV.70 (18 December 2008) 30–2 (Syria).

48 See Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007).

49 Scott Long, 'Unbearable Witness: How Western Activists (Mis)recognize Sexuality in Iran' (2009) 15 *Contemporary Politics* 119.

50 Aeyal Gross, 'The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity and Queer Politics' (2015) 46(2) *Columbia Human Rights Law Review* 81.

case, it serves to divert attention from — and even legitimate — its mistreatment of (assumed anti-gay) Palestinians.

Relatedly, we are also witnessing the chilling spectacle of right-wing politicians and parties in the west, seeking to increase their appeal by supporting LGBTIQ rights. Donald Trump, US presidential candidate, for example, supports gay and transgender rights! Pro-Trump gay conservatives hosted a 'Wake Up' party at the recent Republican Convention in Cleveland, with guests including prominent anti-Muslim activist Pamela Geller, gay neo-conservative Milo Yiannopoulos and Dutch far right-wing anti-Islam and pro-Gay Party for Reform leader Geert Wilders. One of the event's organisers said: 'We have a message for America and the LGBT community … Radical Islam is the number one gay rights issue in the world, and Donald Trump is the only candidate taking this threat seriously'.[51]

This is indeed treacherous terrain for LGBTIQ rights advocates. It casts a pall over what might be considered more positive developments, like the decision (23 yes, 18 no, 6 abstained) of the Human Rights Council in June to appoint an Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity for the next three years.[52]

The terrain of same-sex marriage recognition in Australia is also treacherous. The decision to hold a popular plebiscite on same-sex marriage was made by the Coalition Government in 2015, under the leadership of former Prime Minister Tony Abbott. It was hardly a decision made in good faith. It offered some hope to increasingly insistent same-sex marriage advocates, while also satisfying conservative Coalition MPs who staunchly opposed same-sex marriage (including Abbott). It was not only a means to delay the introduction of legislation that would recognise marriage equality — many in the Coalition party room hoped it would stymie any reform of the *Marriage Act 1961* (Cth), which clearly states that marriage is between a man and a woman, thanks to an amendment adopted in 2004 when John Howard was Prime Minister. It is highly likely that a plebiscite will provide a divisive and hateful platform for those who oppose same-sex marriage to popularise their views.[53]

However, the issue of marriage equality also has other worrying dimensions, which I alluded to earlier. Marriage provides a means for the state to regulate everyone's sexuality, by rewarding monogamy, and procreative, domesticated sexuality. Extending the reach of heteronormative institutions to include same-sex couples creates a new class of 'respectable', 'domesticated', putatively monogamous and procreative homosexuals — which has been described as 'homonormativity' or a form of neoliberal sexual politics which does not

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51 Jim Hoft, 'Pamela Geller, Milo Yiannopoulos and Geert Wilders to Headline Historic "WAKE UP" LGBT RNC Event' on *The Gateway Pundit* (13 July 2016) <https://perma.cc/DS8D-C873>.

52 Human Rights Council, *Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, 32nd sess, Agenda Item 3, UN Doc A/HRC/32/L.2/Rev.1 (28 June 2016).

53 At the time of writing, it has become clear that the Labour opposition, as well as the Greens, will not support the legislation needed for holding the plebiscite on the basis that it would be too divisive and that the issue should be instead decided by a vote of the Parliament.

challenge dominant heteronormative institutions.[54] And which also produces new and perhaps more severe marginalisation of sexual and gender minorities who do not conform. Same-sex marriage may also, potentially, reinvigorate the old stigmatisation of heterosexual de facto relationships. It threatens to restrict everyone's sexual freedoms rather than increase them.

I am not making an argument against marriage equality, or against the importance of the struggle to achieve LGBTIQ rights more generally. What I am offering is a caution about the (un)intended effects of these projects — the new stigmatised communities that legal developments can produce, and the amenability of the promotion of SOGI rights to neoliberal and neo-imperial agendas which are decidedly 'un-queer'.

Which brings me back to the African Caucus in Beijing, and my confusion about where to locate LGBTIQ political goals in a world of so much injustice, of endless war, of environmental devastation, of extreme poverty and unspeakable violence. I am still perplexed and I still do not really know how to do this. I am worried that there may be some truth to the claim by hostile states that the focus on SOGI issues ignores discrimination based on colour, race, (cis)gender and religion. How do we ensure that is not true? One way is to join, in solidarity, with other movements for change — like the Jewish LGBTIQ groups who stand against the occupation,[55] and US Gays against Guns.[56] This means taking more risks with shame.

Lastly, recalling the theme of this lecture series, I wonder whether, at least in some respects, experiences of marginalisation help to increase our humanity, rather than diminish it.

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54 Lisa Duggan, 'The New Homonormativity: The Sexual Politics of Neoliberalism' in Russ Castronovo and Dana D Nelson (eds), *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press, 2002) 175, 190.

55 Wendy Elisheva Somerson, 'The Intersection of Anti-Occupation and Queer Jewish Organizing' (2010) 25(4) *Tikkun* 58.

56 Gays against Guns <http://www.gaysagainstguns.net/>.

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